

**STATE OF MAINE**

**DEPARTMENT OF MARINE RESOURCES**

<b>IN THE MATTER OF THE APPLICATION OF</b>	<b>)</b>	
<b>GRAY'S MUSSEL FARM, LLC FOR AN</b>	<b>)</b>	<b>FINDINGS OF FACT,</b>
<b>AQUACULTURE LEASE LOCATED IN BLUE</b>	<b>)</b>	<b>CONCLUSIONS OF LAW</b>
<b>HILL BAY, EAST OF LONG ISLAND, BLUE HILL, )</b>		<b>AND DECISION</b>
<b>HANCOCK COUNTY, MAINE</b>	<b>)</b>	

On May 5, 2006, Terry Gray representing Gray's Mussel Farm, LLC, of Verona Island (hereafter referred to as the applicant), Maine applied for an aquaculture lease totaling 6.0 acres in the coastal waters of the State of Maine, located in Blue Hill Bay, east of Long Island in Blue Hill, Hancock County, Maine. The applicant requested the lease for a term of ten (10) years for the purpose of cultivating blue mussels (Mytilus edulis) using suspended culture techniques. The application was accepted as complete on May 26, 2006. A public hearing on this application was held on October 25, 2006 at 6:00 p.m. in Blue Hill. Intervenor status was granted to Friends of Blue Hill Bay (hereafter referred to as FOBHB), represented by Sally Mills, of the law firm Hale and Hamlin, LLC, Ellsworth.

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that, taking into consideration the number and density of aquaculture leases in an area, the project will not unreasonably interfere with the ingress and egress of riparian owners; navigation; fishing or other uses of the area; significant wildlife habitat and marine habitat or the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna; or the public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site; that the lease will not result in an unreasonable impact from noise

or lights at the boundaries of the lease site; and that the lease will be in compliance with visual impact criteria adopted by the Commissioner relating to color, height, shape and mass.

**Evidence Introduced Concerning the Nature  
and Impact of the Proposed Lease**

The evidentiary record before the Department regarding this lease application includes the Department file (Exhibit 1), including the application (Exhibit 2), the Department site report (Exhibit 3), a note on revised coordinates provided by the Department (Exhibit 4) and the record of the October 25, 2006 public hearing. At the public hearing, testimony was given by the applicant, Terry Gray representing Gray's Mussel Farm, LLC, the Department's Aquaculture Environmental Coordinator, Jon Lewis, a representative from the US Army Corps of Engineers, Shawn MaHaney, and the Intervenor FOBHB, represented by Sally Mills, Esq.

According to the application the proposed lease is sought to raise blue mussels on a lease site totaling 6.0 acres, for a lease term of ten (10) years. The applicant testified that the metes and bounds description of the lease site contained in the application with the Department's revised coordinates based on the common northeast corner of the existing experimental lease are the correct coordinates.

The applicant described his background and familiarity with the Blue Hill area. He testified that he intends to conduct mussel raft aquaculture on the proposed lease site. He described the site selection to be located such that it would be protected from strong westerly winds by Long Island; the proximity to Newbury Neck would provide protection in an easterly storm and Blue Hill would shield it from northerly storms leaving his only real exposure from the south which is rare during the more severe winter storms. According to the application access would be from the public landings in South Blue Hill or Pretty Marsh.

According to the application each raft is 40 ft. x 40 ft. and holds approximately 400-450 50-ft. drop lines on which the mussels grow. Each cluster of up to three rafts would be secured with 750 kilogram plow anchors off the outermost four corners. The applicant stated that he now has two rafts and the maximum number of rafts on the proposed site would be six. The

build up to six rafts would be gradual over time as income and expenses allow with no immediate changes. The earnings from the first two rafts would go towards adding a third raft; there would not be a jump to six rafts any time soon.

The applicant testified that the site has proven to be a good seed site, meaning that he does not have to buy much seed from other sources since the site produces a lot of natural set. According to the application other seed sources, as needed, would come from within the state of Maine. The applicant stated that when purchasing seed it has been from Evan Young, Tighrope Seafarm in Blue Hill. He explained that Carter Newell, of Aquaculture Harvesters LLC, harvests the mussels with the F/V Mumbles when they reach market size and that this vessel is also equipped with the socking equipment used to seed the drop lines on the rafts. He currently sells the mussels produced to Great Eastern Mussel Farms, Inc. Evan Young has also assisted in the seeding process and the applicant has hired Tim Levesque with the F/V Thunder Bay to change predator nets. The applicant explained that he has hired these contractors because he does not have a vessel large enough to handle the extreme weights, particularly with changing the predator nets. His plans are to upgrade to a larger vessel when he can afford to do so in a financially secure way and move away from the help he must now hire. He testified that he is grateful to have the assistance from other companies, which he described as being similar to other start-up industries in Maine where groups of people work together towards a common goal, such as the blueberry growers or lobster cooperatives that provide assistance to start up companies. He testified that such assistance eventually allows start up companies to make it on their own and that he intends to do so as well. He explained that he earns a percentage of the value of the harvested mussels and the rest pays for the processing, overhead and paying off of the lease-ownership of the rafts from Gem Mara Farms, LLC. The applicant testified that none of the contractors described are co-owners or partners of the proposed lease or existing experimental lease.

According to the applicant harvesting of the mussels takes approximately 10-14 days to harvest one raft, weather dependent. Seeding occurs in the spring and or fall for approximately

4 weeks per year; and tending and maintenance takes approximately 2 weeks per year.

According to the applicant he visits the site 1-2 times per week year round to monitor and operate the farm. He explained that depending on the weather he might not be able to work a full day at a time, particularly during harvesting when the amount of time may depend on how heavy the lines are, what the quantity of mussels is per rope, etc. The applicant explained that the frequency of changing the predator nets has been a learning curve for him. He explained that the first year he was so concerned about the eider duck predation that he installed the predator nets at the same time he installed the rafts. The nets fouled very quickly that summer with an additional natural set of mussels that became too heavy for him to handle. He had to leave the nets on over the first winter requiring that he hire the F/V Mumbles to remove the nets. In the second year he did not reinstall the nets until October 15<sup>th</sup>, and then removed them in April. In the third year he reinstalled them October 1<sup>st</sup>. This three year experimental time period has allowed him to learn how to use the nets for a shorter duration, keeping the fouling and, therefore, the weight of nets down. This should allow him to use his own smaller boat instead of hiring the larger vessels to tend the predator nets.

The applicant requested that the condition that no predator nets be cleaned on site be removed, based on the infrequency of cleaning needed. He explained that he has learned from the previous three years experience that if ducks remained in local waters during the summer months it would be more effective to be able hoist the nets to pressure wash them quickly, leaving them in place. If the ducks stayed away this would not be necessary, but he could not guarantee what the ducks will do. Pressure washing of the four nets per raft would require about one day per raft.

The applicant provided an environmental characterization of the proposed lease area. According to the application, the bottom sediments consist of soft mud. The bottom has a very gentle downward slope toward the east. The depths range from 70 to 80 feet at mean low water. The current flow is estimated to be 4.7 cm/second, with a maximum of 18 cm/second

and flows in a north/south direction. Resident flora and fauna consist of starfish and mussels fallen from the existing rafts.

The applicant testified that he has obtained a commercial insurance policy for protection from collisions and formed a limited liability corporation, both of which he has done based on recommendations made by persons during the scoping sessions and first lease hearing.

The applicant testified that during the past three years of operating the experimental lease he has checked the beaches and shore from the northern end of Long Island to south of the lease site to make sure that gear has not washed ashore. The applicant testified that he is willing to update and renew the agreements with the Blue Hill Selectmen and Acadia National Park as described in the conditions of the experimental lease regarding no night lighting other than what is required by the US Coast Guard, noise, debris management and use of Long Island. Operations would continue to take place during daylight hours except in the event of an emergency such as a mooring failure. The applicant also confirmed that the noise levels experienced on the site now would not change from the levels experienced during the past three years.

In response to questions the applicant confirmed that he would continue to mark the lease site in accordance with the US Coast Guard and DMR requirements; that he would continue to allow navigation, lobster and recreational fishing in the open areas of the proposed lease; and that he would clear lobster gear that becomes entangled when the owner identifies it to him. He stated that during the previous three year lease he had no incidents with fishing gear entanglements. Regarding the current benthic impact described in the Department's site report the applicant testified that he would shift the footprint of the existing rafts when the third raft is added due to economics and convenience and would have plenty of room within the proposed six acres to move onto. He explained that the impact is due to the heavy drop off in the first two years of the experimental lease due, in part, to his eagerness to seed all the lines the first July. The lines caught a huge over set of mussels the end of July and into August that doubled the amount of mussels on the lines. As the mussels grew there were too many per

line, resulting in a lot of drop off in the first year. To reduce the chances of this happening again, he has improved his timing of seeding by waiting to seed after the local mussel set, such as in November or May. The applicant stated that if the Department required him to move the existing rafts he would comply.

In response to questions, the applicant explained that the proposed lessee should be Gray's Mussel Farm, LLC and that he would drop the preface 'Terry Gray dba' as written on the application. The applicant testified that he is the sole organizer and member of this LLC. He stated that he was advised by the DMR to make this change on the written application, which eliminates an unnecessary and costly transfer procedure in the future. He indicated that those persons who know of his business commonly refer to it as Terry Grays' raft or farm and do not find using the 'dba' to be an ambiguous reference hiding a hidden partnership. The applicant also responded to questions about his financial capabilities, business responsibilities and details of his exact earnings, contract and lease agreements. The applicant testified that the finances as described in the application would be available to Gray's Mussel Farm, LLC should it become necessary.

The Department's Aquaculture Environmental Coordinator (AEC) conducted a site visit at the proposed lease area on July 24, 2006. The AEC created a site report summarizing the information obtained during the site visit and provided testimony regarding the site report at the public hearing. Additional notes were also provided to correct the coordinates of the proposed lease. According to the revision notes and the AEC's testimony, the proposed site is located approximately 1,030 to 1,167 feet from the shore of Long Island.

The AEC testified that instead of a diver survey a drop camera was used to record bottom observations. The video documented the mussel drop off that has occurred beneath the rafts. He explained that he has monitored seven mussel farms in the last few years with a wide variety of benthic responses, some heavy and some light. In this particular case it was a fairly heavy drop off. In the vicinity of the north end of the raft it is a featureless fairly soft bottom with not a lot of life. Due to the mussel drop off the bottom in the proximity of the rafts has become

covered by a sulfide reducing bacteria called Beggiatoa sp., which can form due to a heavy nutrient load, i.e., decaying mussels that cause anoxic conditions beneath them with the oxygenated waters above. This occurs in natural environments too. When mussels from rafts fall to a featureless bottom marine organisms move in to take advantage of that nutrient source, such as live mussels, crabs, starfish, filter feeders like sea cucumbers, anemones and mud/sand shrimp, as seen on the south end of the two rafts. Monitoring of mussel rafts by the Department is ongoing to better understand the rates of changes in community structure. The AEC testified that the conditions observed are not permanent, widespread or catastrophic and that with decreased or curtailed drop-off the free food source could be eliminated through biological consumption, which would allow the bottom community to recover, i.e., revert to normal conditions. He estimated it might take a year or so with a reduction in the dropped mussels. The proposed site would be included in the monitoring program and, if conditions warranted, the rafts would then be requested to be shifted. He also noted that there is a net on bottom off the southeast corner of the rafts.

The AEC explained that during the past three years the applicant has worked the two existing rafts under the limited-purpose aquaculture lease and pointed out that, by definition, an experimental lease allows persons to have a learning curve for a limited period, which he believes has taken place.

The AEC apologized for misspelling the Harbormasters name, Dennis Robertson, and asked that this change be noted in his report. He also noted a revision was needed to the applicant's coordinates. The applicant's drawing of the metes and bounds indicate an extension of his experimental lease. The proposed lease would start with the common northeast corner coordinates and follow the same bearings or angles with the updated distances. The applicant also provided coordinates for the proposed lease corners; however, the AEC noted that these do not match their metes and bounds description or figures. The coordinates, based on the existing northeast corner coordinates and proposed metes and bounds, were therefore revised.

The AEC testified that in his professional judgment, based on the 10-12 visits to Blue Hill Bay locally over the years, lobster traps tend to be set along the 60 foot contour. He also testified that, in his experience, the greatest concentration is located between the proposed lease and Long Island, and nearest to shore in shallower water, as compared to where the rafts are located. The AEC testified that there are no leases within 1 nm and there is one proposed lease within 2 nm. According to his report there are 4 mussel aquaculture lease sites in Blue Hill Bay proper and no moorings within 1,000 feet. According to the site report there is ample room for navigation with 1,000 feet of navigable water to the west of the proposed lease and approximately 4,000 feet of navigable waters to the east of the proposed lease.

According to the AEC's report the proposed lease is located in an area classified as open for the harvest of shellfish by the Department's Water Quality Division. Also, according to the report the proposed lease site is not located in an "Essential or Significant Wildlife Habitat" regulated by the Department of Inland Fisheries and Wildlife (IF&W).

Shawn MaHaney, representing the US Army Corps of Engineers (ACOE), testified that this proposal has been reviewed by the ACOE, the US Environmental Protection Agency (EPA), US Fish and Wildlife Service (F&WS) and the National Marine fisheries Service (NMFS), and that no objections were raised by any of those agencies. The existing farm has an ACOE permit and, to date, the ACOE has not received any complaints on navigational issues, gear on Long Island, etc., from any parties. In response to questioning he stated that the current ACOE permit is in the name of Terry Gray but that the ACOE permits are transferable. When the permit is reissued the applicant's name would be as stated in the application or as requested in writing.

Intervenor FOBHB argued that the application was submitted in the wrong name. Specifically, FOBHB complains that the application states the applicant is "Terry Gray doing business as Gray's Mussel Farm, LLC," and, as such, the identity of the applicant is unclear. FOBHB also complained that the application failed to supply evidence of financial capacity, arguing that the financial information in the application is in the name of Terry Gray individually.

According to the Intervenor all financial documentation in the application must be in the name of the LLC even though the applicant is the sole operator and owner of the LLC. Finally, FOBHB argued that Great Eastern Mussel Farms Inc. is really the applicant under this lease because of its relationship with Terry Gray. FOBHB pointed out that Great Eastern Mussel Farms Inc. provided the rafts, does the harvesting and sells the mussels. FOBHB argued that the applicant is only a contract farmer and that, in its opinion, this type of relationship reflects a creeping monopoly of leases.<sup>1</sup>

In response to questions the Intervenor testified that the FOBHB has no objections based on any of the statutory lease decision criteria.

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<sup>1</sup> None of these objections address the statutory criteria for the granting of an aquaculture lease under 12 MRSA §6072. However, even though these objections go beyond the lease criteria, the Department is satisfied that the applicant was adequately identified in the application and that there would be little, if any, benefit to the public in requiring the application to be re-filed as urged by FOBHB. Indeed, the harm to the applicant by requiring that the application process be started anew outweighs any benefit to the public, especially given the technical legal nature of FOBHB's argument. In addition, despite FOBHB's objections to the technical wording of the named applicant, the account information contained in the lease application, coupled with the fact that two mussel rafts have successfully been operated on the proposed site pursuant to an experimental lease for the past three years, provided sufficient information for the Department to determine that the financial capacity existed to carry out the proposed lease activities. Finally, the Department does not find, on the basis of the application or the testimony provided at the hearing, that Great Eastern Mussel Farms, Inc., or any of its subsidiaries, would be a tenant of any kind in the proposed lease. The evidence shows, inter alia, that Terry Gray purchased the rafts from Great Eastern Mussel Farms, Inc. and applies a percentage of his harvest income against the purchase price for those rafts; that he uses contractors to assist with activities such as seeding and harvest because he does not have a vessel large enough to handle the extreme weights; and that he plans to upgrade to a larger vessel when he can afford to do so in a financially secure way and move away from the help he must now hire. The applicant is ultimately responsible for the lease requirements. In short, the Department finds no merit in FOBHB's objections. The Department has determined that the application was complete, that it adequately demonstrated financial capacity, and that Gray's Mussel Farm, LLC is the proper applicant for the proposed lease.

### **Findings of Fact**

The proposed lease is located east of Long Island in Blue Hill Bay, a distance of approximately 1,030 – 1,167 feet from the shoreline. Access to the proposed lease would be by boat from the South Blue Hill and Pretty Marsh town landings. There are no docks or moorings located in the area of the proposed lease site. No use of riparian land was requested or required. The applicant has operated a mussel farm in the same location for the past 3 years without incident. Based on this evidence, I find that the lease will not unreasonably interfere with the ingress and egress of riparian owners.

The proposed lease is located in water depths of approximately 70-80 feet at mean low water. There is approximately 1,000 feet of navigable water to the west of the proposed lease site and approximately 4,000 feet of navigable water to the east. The Department's site report indicates that the Town of Blue Hill's harbormaster, Mr. Denny Robertson, did not feel the proposed site would be a hindrance to navigation, and the testimony of Shawn MaHaney indicates that the ACOE received no complaints relating to navigational issues during the term of the experimental lease. Based on the foregoing, I find that the proposed lease will not unreasonably interfere with navigation, as long as the lease area is marked in accordance with U.S. Coast Guard and DMR requirements.

Lobster fishing and scalloping fishing take place in the general proposed lease area. However, most lobster fishing takes place closer to shore in more shallow depths. There are no existing aquaculture leases within one nautical mile and the nearest proposed aquaculture lease is over 2 nautical miles south of the proposed lease site. In the three years that the experimental lease has been in place neither the Department nor the ACOE have received any complaints of interference with fishing or other activities. The area of the proposed lease is classified as "open" for the harvest of shellfish. The applicant will allow lobster fishing and recreational fishing on the lease site. I find that the proposed lease will not unreasonably interfere with fishing or other uses of the area.

The bottom of the proposed lease site consists of soft mud. The current flow is estimated to be 4.7 cm/second, with a maximum of 18 cm/second. Blue mussels are filter-feeders and, therefore, no feed or other pollutants will be discharged into the water at the proposed lease site. Although there is evidence of nutrient loading from drop off of mussels that occurred during the first 1-2 years of the experimental lease, the AEC indicated that the limited footprint of the rafts, coupled with a decreased occurrence of mussel drop off, would allow the observed impact to naturally clear. The site would be monitored similar to other mussel farms and the Department will request that the rafts' footprint be shifted when such a shift is found necessary by the Department. The applicant testified that there should be a continued decrease in the mussel drop off through his improved timing of seeding the rafts. The applicant testified that he would move the rafts when requested by the Department. Based on this evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

All seed shellfish will be obtained from the proposed site or Maine sources such as Evan Young in the Blue Hill Salt Pond. Based on this evidence, I find that there is an available source of blue mussels.

The proposed lease site is not located within 1,000 feet of any public beaches, parks, docking facilities, or conserved land. Based on this evidence, I find that the proposed lease site activities will not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency.

The motorized equipment on site will consist of two vessels used to seed, harvest and service the site until the applicant can afford a larger vessel. The fishing vessel "Thunder Bay" would be used for changing predator nets if necessary and the harvest barge "Mumbles," which is equipped with mufflers to further reduce engine noise, may be used for seeding and harvesting. The equipment would be used a total of approximately 2 weeks/cycle per raft for seeding, approximately 10-14 days/cycle per raft for harvesting, and approximately 1

week/cycle per raft for maintenance. The applicant does not plan to use lighting at the lease site other than required navigational lighting. The applicant asked to be allowed to pressure wash the predator nets from his own vessel in case the need for predator nets in the summer months changes due to duck presence. The noise from pressure washing would not be greater than the use of the F/V Thunder Bay and not take much greater time. Therefore, this is not considered an unreasonable request. I find that the proposed lease will not result in an unreasonable impact from noise or lights at the boundaries of the lease site.

The colors of the proposed gear, black and gray, will allow the gear to blend in with the surrounding area. All equipment on the lease site will be less than 20 feet in height. I find that the proposed lease will comply with visual impact criteria.

### **Conclusions of Law**

Based on the above findings, taking into consideration the number and density of aquaculture leases in the area, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation, as long as the lease area is marked in accordance with U.S. Coast Guard and DMR requirements;
3. The aquaculture activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;
4. The aquaculture activities proposed for this site will not unreasonably interfere with significant wildlife habitat and marine habitat or with the ability of the site and surrounding marine and upland areas to support ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of blue mussels to be cultured for the lease site;
6. The aquaculture activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of a beach, park, docking facility or certain conserved land owned by the Federal Government, the State Government, or a municipal governmental agency;
7. The aquaculture activities proposed for this site will not result in an unreasonable impact from noise or lights at the boundaries of the lease site; and

8. The aquaculture activities proposed for this site will be in compliance with visual impact criteria.

Accordingly, the evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072.

### **Decision**

Based on the foregoing, the Commissioner grants the requested lease of 6 acres to the applicant for 10 years from the date of this decision for the purpose of cultivating blue mussels (Mytilus edulis) using suspended culture techniques. The applicant shall pay the State of Maine rent in the amount of \$100.00 per acre per year. The applicant shall post a bond or establish an escrow in the amount of \$5,000 conditioned upon his performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

### **Conditions to be Imposed on Lease**

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. fishing and navigation are allowed on the open areas of the lease;
2. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources regulations;
3. the leaseholder will clear all lobster gear that becomes tangled with his equipment when the owner identifies his equipment to the leaseholder;
4. the leaseholder shall reach an agreement with Acadia National Park officials on night lighting other than lighting required by the U.S. Coast Guard, noise, debris management and use of Long Island;
5. the leaseholder shall reach an agreement with the Blue Hill Selectmen on the same items in 4 above and the use of the South Blue Hill town landing;
6. the agreements under conditions 4 and 5 shall be entered into within six months from the date of this decision and copies of the agreements shall be provided to the Aquaculture Administrator, in writing, prior to finalizing the lease documentation; and

7. the leaseholder shall not access Long Island in connection with the aquaculture activities, other than to clean up any errant gear that may wash ashore on the Island.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

**Dated:** \_\_\_\_\_

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**George D. Lapointe (Commissioner)**  
**Department of Marine Resources**